BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WAUPACA COUNTY HIGHWAY DEPARTMENT EMPLOYEES, LOCAL 1756, AFSCME, AFL-CIO

and

WAUPACA COUNTY

Case 103
No. 55422
MA-10010

Appearances:

Mr. Jeffrey J. Wickland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Godfrey & Kahn, S.C., by **Attorney James R. Macy**, appearing on behalf of the County.

ARBITRATION AWARD

Waupaca County Highway Department Employees, Local 1756, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Waupaca County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as the sole Arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Waupaca, Wisconsin, on February 10, 1998. The hearing was transcribed and the parties filed briefs and reply briefs, the last of which were exchanged on April 16, 1998.

BACKGROUND

The basic facts underlying the grievance are not in dispute. On February 16, 1997, a Sunday, a snowfall occurred in Waupaca County. The County has a number of shops located

throughout the County and employes are assigned, for snow removal purposes, to particular sections which are certain roads that they plow from these shops. Generally, when overtime is required, the County calls out those employes assigned to a particular section because each is familiar with his normally assigned section. The Larrabee shop is located in the northwest corner of the County and the foreman of the shop is Dick Rohan, a non-bargaining unit employe. On February 16, 1997, Rohan called in employes Schwede and Wegener to plow their normally assigned sections referred to as 4B and 4C. The grievant is normally assigned to Section 4A. The grievant was not called in but rather Foreman Rohan performed the necessary work on Section 4A. Commonly, foremen perform similar work to that of bargaining unit employes and if an employe cannot report to work due to illness or CDL requirements, the foreman will plow the employe's normally assigned section. On February 16, 1997, the grievant was available and he expected to be called to plow his section. The grievant became aware on February 17, 1997, that the foreman had performed work on Section 4A and filed the instant grievance.

ISSUE

The parties were unable to agree on a statement of the issue. The Union frames the issue as follows:

> Did the County violate the contract when it failed to call in a bargaining unit employe to plow the roads in County Section 4A on Sunday, February 16, 1997?
>
> If so, make Grievant Tim Neely whole.

The County frames the issue thusly:

> Did the County violate Article 2.03 and/or Article 4.01 of the collective bargaining agreement when a foreman came into work instead of calling in a third bargaining unit member on February 16, 1997?

The undersigned frames the issue as:

Did the County violate the collective bargaining agreement when on Sunday, February 16, 1997, a foreman performed winter maintenance work on Section 4A instead of calling in the grievant, a bargaining unit member normally assigned to said Section?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

Article II – Management Rights

2.01 The Waupaca County Board of Supervisors, through its duly elected Highway Commissioner, possesses the sole right to operate the Highway Department and all management rights repose in it, except as otherwise specifically provided in this Agreement and applicable law. These rights include, but are not limited to the following:

A) To direct all operations of the Highway Department;
B) To establish reasonable work rules and schedules of work;
C) To hire, promote, transfer, schedule and assign employees within the Highway Department;
D) To suspend, demote, transfer, discharge and take other disciplinary action against employees for just cause;
E) To layoff employees because of lack of work or other legitimate reason;
F) To maintain the efficiency of the Highway Department operations;
G) To take reasonable action, if necessary, to comply with State or Federal law;
H) To introduce new or improved methods or facilities or to change existing methods or facilities;
I) To determine the kinds and amounts of services to be performed as pertains to the Highway Department operations and the number and kinds of classifications to perform such services;
J) To contract out for goods and services, provided however, that no employee shall be on layoff or laid off or suffer a reduction of hours of work as a result of such subcontracting;
K) To take whatever action is necessary to carry out the functions of the Highway Department in situations of emergency.

2.02 Any dispute with respect to the reasonableness of the application of these management rights by the Employer shall be appealable by the Union or an employee through the grievance and arbitration procedure contained herein.

2.03 It is further agreed by the Employer that the management rights shall not be used for purposes of undermining the Union or discriminating against any of its members.

2.04 Solicitations for membership or carrying on of any Union business on Highway Department time shall be grounds for immediate discharge unless for the purpose of carrying out the provisions of Article V, or meeting in bargaining session with the management.

. . .

Article IV – Cooperation

4.01 The Employer and the Union agree that they will cooperate in every way possible to promote harmony and efficiency among all employees. (The Employer agrees to maintain certain conditions of work, primarily related to wages, hours and conditions of employment not specifically referred to in this Agreement in accord with previous practice.)

UNION'S POSITION

The Union contends that foremen do not perform bargaining unit work where the employe assigned such work is available. It admits that foremen perform such work in the absence of the employe or in assistance of such employe. It submits that the action of the foreman servicing 4A instead of the grievant undermines the Union. The Union asserts that some arbitrators find that the recognition, seniority, posting, call-in and job classification provisions along with past practice restrict an employer's right to perform bargaining unit work. It points out that other arbitrators hold that in the absence of express contract language the employer may assign bargaining work to supervisory employes so long as the rights of bargaining unit employes are not violated. It submits that the actions of the foreman undermined the contract and the rights of employes and taken to the extreme could allow foremen to fill vacancies or avoid a layoff by self-assignment and bump a bargaining unit member.

The Union argues that there is a clear past practice concerning snow removal assignments and that is when work is available in the employe's primary posted assignment, the employe will be assigned such work. It refers to an undated memo from the former Highway Commissioner which stated as follows:

> Due to some recent incidents, from now on whenever it becomes necessary to call anybody in to work you will call the person or persons that normally works that area depending on the season. For example, towns will be the person or persons normally plowing snow there. County sections and state sections; the person or persons assigned.
>
> You will use the call-in forms furnished when you call them notating if they refuse or do not answer the phone. If their phones are answered by an answering machine you may assume they are not available and notate on the form answering machine. Also the date and time must be filled in for each person called.
>
> If they are not available or refuse, you may call anybody else that you please that works for the highway in order to provide a timely response for whatever the situation.

It submits that this practice has been followed for quite some time with only one exception in the last twenty (20) years and that case was resolved in a meeting with the immediate supervisor.

The Union claims that the principles of equity and reason should be applied to the instant case. It states that there is no clear language permitting or prohibiting foremen from performing bargaining unit work. It maintains that its argument is reasonable and equitable as it recognizes the County's right to assign action under snow removal operations as well as the Union's interest in maintaining the integrity of the bargaining unit. It requests that the grievance be sustained and the grievant made whole.

COUNTY'S POSITION

The County contends that the contract allows foremen to perform bargaining unit work during call-in situations. The County relies on the Management Rights clause which reserves to it the right to schedule and assign employes. It asserts that it simply exercised its management rights and there is no language in the contract which prohibits foremen from performing bargaining unit work. The County argues that it has historically exercised its rights to perform work done by unit employes. It submits that there is no restriction regarding snow plowing and the foreman at the Larrabee Shop has plowed snow on various occasions. The County observes that the foreman did not plow snow on the date in question because the snowfall was minimal.

It refers to the testimony of the foreman at the New London shop that he plowed snow in situations when no unit employes were called to work. The foreman at the Helvetia shop testified that he too plowed snow on a variety of occasions when unit employes were not called into work.

The County points out that no provision of the contract requires it to call in unit members to plow snow. It states that all told there has been no violation of the agreement and the grievance should be denied. The County asserts that bargaining history supports its position because in negotiations the Union specifically proposed a limitation on foremen performing bargaining unit work and it is was unsuccessful in gaining this provision. It insists that the Union is attempting to get in this arbitration that which it failed to gain in negotiations. The County refers to the Zipper clause in support of its position. It concludes that the grievance is without merit and should be denied.

UNION'S REPLY

The Union contends that the County's reliance on the Management Rights clause is misplaced. It asserts that where the contract is silent, an employer can establish and enforce work rules provided they do not conflict with the collective bargaining agreement and may not be unfair, arbitrary or discriminatory. It points out that there are limits on the exercise of management rights under Secs. 2.03 and 4.01 of the contract. It concedes that the County had the right to determine when, which and how many employes to call in; however, when the foreman did not contact the grievant and did the work himself, this violated past practice, discriminated against the Union and was an unreasonable exercise of management rights. It notes that the County suggested that the duties performed by the foreman were distinguishable from the unit employes assigned to work on 4B and 4C. The Union takes the position that the duties were part of "snow removal program work" and are not distinguishable. The Union reiterates its position that foremen work with, not instead of, normally assigned employes. It claims that this has been the practice for twenty years and the grievant should have been called in to work on 4A and the foreman's role is secondary or supplemental to the grievant's. The Union submits that the testimony of the foremen support the Union. It argues that duties performed on normal work days should be disregarded and duties performed when the regularly assigned employe is unavailable or unable to perform the work are also inapplicable. It submits that the foreman was unable to specify exactly what duties he performed in the past when employes were called in. It states that the other foremen were unsure that they performed unit work when employes were available.

The Union asserts that bargaining history should be disregarded. The Union contends that its proposal simply harmonizes the role of management rights with the rights of the Union and its members. It argues that the language, if it had been agreed to, would preclude the instant case from being before the Arbitrator, but the failure to negotiate it in does not mean

there are no limits on the role of foremen performing unit work. The Union maintains it has primary jurisdiction over the work and foremen have a secondary role of working along side regularly assigned employes or working if unit members are unable or unavailable to work. It requests that the grievance be sustained.

COUNTY'S REPLY

The County contends that the contract does not limit the County's right to assign overtime. It states that absent a provision that expressly protects bargaining unit work, the County reserves the right to assign work to whomever it chooses. It cites arbitral authority in support of its assignment decision and, in the absence of any contract provision, maintains it has retained the right to determine how many employes to call in and to have foremen plow snow. The County rejects the Union's assertion that the decision not to call in unit employes could allow foremen through self-assignment to bump unit employes because this ignores the posting and layoff language of the contract. It notes that snow plowing is not a posted position but merely an assignment which the County can change. It observes that no one lost normal work hours and no layoff is involved.

With respect to undermining the Union and discriminating against its members, the County insists there is no proof that any action was taken against the Union or any member and a lost overtime opportunity does not undermine the Union or discriminate against its members. The County claims that the Union's reliance on past practice is not supported and misapplies the law of past practice. It argues that past practice does not apply where contract language is clear and unambiguous. It relies on its Management Rights clause and notes the absence of any language guaranteeing overtime or call in. It maintains that past practice does not control. The County argues that no past practice was established. It observes that past practice must be unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period of time. It submits that record establishes that foremen have historically performed similar work as unit members during call in which contradicts the Union's past practice claims. It maintains that the memo from a past Highway Commissioner was simply how he elected to exercise his assignment prerogative and is not in use today. The County claims that it has changed the method of making assignments which it has the right to do. It asserts that had it never elected to have foremen plow snow, nothing restricts that right and it could now make that assignment. The County insists that the grievance should be denied.

DISCUSSION

There is no provision in the collective bargaining agreement which prohibits the County from assigning bargaining unit work to supervisors or, for that matter, anyone outside the bargaining unit. The record establishes that in negotiations for the present collective bargaining agreement, the Union proposed a limitation on bargaining unit work and it was

unsuccessful in obtaining this provision. Additionally, the work of snow removal has not been performed exclusively by bargaining unit members. Thus, the agreement does not prohibit the assignment of bargaining unit work to foremen and foremen have performed bargaining work on a regular basis. Under Article II, the County has the right to schedule and assign employes. It could have assigned the grievant to Section 4A on February 16, 1997, if it wanted to, or not assigned it to anyone or assigned it to a foreman. The Union does not have the exclusive right to unit work and the assignment of such on overtime is the County's decision under Article II. The assignment of unit work to avoid overtime does not undermine the Union nor discriminate against its members.

Section 4.01 provides that the County agrees to maintain certain conditions of work, primarily related to wages, hours and conditions of employment not specifically mentioned in the agreement in accordance with past practice. This provision is not a model of clarity as what are the "certain conditions of work" referred to? Primarily related to wages, hours and conditions of employment is the standard reference to mandatory subjects of bargaining. This could refer to subcontracting but subcontracting is specifically mentioned in Article II. It could refer to overtime but Article II allows the County to schedule and assign work whether or not it is overtime. In the snow removal program work, the foreman comes in with the employes who have been called in and the Union admits that he performs bargaining unit work. If only two employes are called in for 4B and 4C, and the foreman who already is on overtime does 4A, and the grievant is not called in, there is no overtime because overtime would only be generated if the grievant came in and performed work. It would be simply additional overtime which the County could decide it did not need.

The Union argues that past practice prohibits a foreman from doing snow removal program work on an employe's regular section if that employe is available. If the employe is not available then the foreman can perform the work. The Union relies on the memo of the former Highway Commissioner, but that only states that whenever it becomes necessary to call someone in, the person who normally works the area will be called in. But if it is not necessary to call anyone in, the memo has no effect. In the instant case, the foreman apparently did not deem it necessary to call the grievant in. The County has asserted that the foreman never plowed Section 4A; however, he did sand and salt it, so for all practical purposes he was engaged in snow removal on 4A. The Union has asserted the past practice with respect to who is assigned overtime is also applicable to the performance of bargaining unit work. In other words, if overtime is necessary, the normally assigned employes should be assigned it. Does that mean that if bargaining unit work is available, then a bargaining unit employe gets it? The Union is confusing whom to call in if overtime is necessary with a requirement to call in a bargaining unit employe if bargaining unit work is performed. There is no past practice requiring bargaining unit work be only assigned to bargaining unit members. The plain language of Article II and negotiating history would have no effect if this argument is accepted and would give the Union a right it failed to negotiate into the contract. The contract takes precedence over a contrary past practice if there was one, but here there

was no past practice on bargaining unit work assignment being assigned only to bargaining unit members. Thus, the foreman's snow removal work on Sunday, February 16, 1997, on Section 4A did not violate past practice or the collective bargaining agreement.

Based on the above and foregoing, the record as a whole and the arguments of counsel, the undersigned issues the following

AWARD

The County did not violate the collective bargaining agreement when on Sunday, February 16, 1997, a foreman performed winter maintenance work on Section 4A instead of calling in the grievant who normally is assigned to Section 4A, and the grievance is therefore denied.

Dated at Madison, Wisconsin, this 3rd day of July, 1998.

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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